

FILED

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JAMES R. BROWNING, Clerk

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. 27.—October Term 1958.

**ARTHUR S. FLEMMING, Secretary
of Health, Education and Welfare,**

PETITIONER,

vs.

**FLORIDA CITRUS EXCHANGE,
FRANK R. SCHELL, et al.**

RESPONDENTS.

**PETITION OF FRANK R. SCHELL
FOR REHEARING
JOINED IN BY ALL OTHER RESPONDENTS**

**MORRIS E. WHITE
Citizens Building
Tampa, Florida**

**J. LEWIS HALL
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**ATTORNEYS FOR RESPONDENT
FRANK R. SCHELL**

**IN THE
SUPREME COURT OF THE UNITED STATES**

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**ARTHUR S. FLEMMING, Secretary
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**FLORIDA CITRUS EXCHANGE,
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RESPONDENTS.

**PETITION OF FRANK R. SCHELL
FOR REHEARING**

Frank R. Schell, a respondent herein, respectfully petitions for rehearing of this Court's judgment entered December 15, 1958 and for grounds of this petition, says:

1.

Petitioner filed with the Secretary of Health, Education and Welfare a petition to reopen the cause and proffered additional testimony and evidence that FD&C Red 32 is harmless within the intent and meaning of Section 406(b) of the 1938 Food, Drug and Cosmetics Act. (R. 116-119)

2.

In said petition it was alleged that respondent Schell had no notice of any proceedings to decertify FD&C Red 32 and thereby destroy the Color-Added process, until the formal notice that hearings had been set for January 19,

1954 was published in the Federal Register of December 19, 1953, and that such notice was too late for respondent to employ and inform counsel as to the complexities of the case. (Re. 117-118)

3.

The Secretary denied respondent Schell's petition to reopen the hearings. (R. 118)

4.

The reports of tests run by Food and Drug Administration 1940-1941 and the reports of tests for cumulative or chronic toxicity of FD&C Red 32 over five to six years, 1938-1944, are very sketchily summarized in the exhibits filed by Food and Drug Administration at the hearing (R. 239-240; 240-241; 253-254) but reports of the tests given in 1951-1953 were set forth in great detail in the record. (R. 239-259). By denying petition to reopen the Secretary denied to respondent Schell the opportunity to present and have included in the record full reports of the earlier tests conducted in 1940-1941, which tests resulted in the certification of FD&C Red 32 as harmless.

5.

The report of the tests run by Food and Drug Administration in 1951-1953 contain statements and conclusions that cast serious doubts upon the validity of such tests, for example: "Five of the eleven dogs which had been found to be sensitive to the cathartic action of FD&C Orange 1 was tested on FD&C Orange 2" (R. 239), and the results of the cathartic tests of FD&C Red 32 begins with these words: "Ten of the eleven dogs which had been found to be sensitive to the cathartic action of FD&C Orange 1 were tested on FD&C Red 32". (R. 259)

It was not good pharmacological practice when testing for cathartic action of FD&C Red 32 to use dogs that had been shown to be sensitive to the cathartic action of other coal-tar colors by prior dosages thereof, yet either the five dogs tested with FD&C Orange 2 or five of the ten dogs tested with FD&C Red 32 were being given third cathartic dosages after being found to be sensitive to the first dosage. The five dogs that proved to be sensitive to a dose of but 100 milligrams of the color may well have had four dosages of coal-tar colors, all fed on an empty stomach which would intensify ill effects.

6.

The denial of the petition by the Secretary to grant petition to reopen was urged in the Circuit Court of Appeals, but since the Circuit Court of Appeals reversed the order of the Secretary on other grounds, the propriety of the denial of respondent's petition to reopen was not adjudicated and the propriety of such denial is not adjudicated in the opinion and judgment of the Supreme Court of the United States of date of December 15, 1958.

7.

By denying respondent's petition to reopen the hearings, the Secretary denied to respondent Schell the opportunity of cross-examination and of opportunity to present evidence exposing the inconsistencies in the findings of Food and Drug Administration and the fallacies in the conclusions of Food and Drug Administration as to the validity and meaning of the test conducted by Food and Drug Administration in 1951-1953.

WHEREFORE, respondent Schell respectfully petitions this Court for reargument and rehearing on the matters and things presented herein.

Respectfully submitted,
MORRIS E. WHITE
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Tampa, Florida

OF HALL, HARTWELL & DOUGLASS
Professional Building
Tallahassee, Florida
ATTORNEYS FOR RESPONDENT
FRANK P. SCHELL

All other respondents adopt and join in the foregoing
Petition for Rehearing, and the undersigned attorney
certifies that the same is presented in good faith and
not for the purpose of delay.

JAMES HARDIN PETERSON

ATTORNEY FOR FLORIDA CITRUS
EXCHANGE, et al
P. O. Box 111
Lakeland, Florida

CERTIFICATE OF SERVICE

I, J. Lewis Hall, of counsel for respondent, Frank R. Schell, do hereby certify that this Petition for Rehearing is presented in good faith and not for delay and I have on this 31st day of December, A. D. 1958, mailed copies of the Petition to each of the following persons, mail, postage prepaid:

Honorable Arthur S. Flemming
Department of Health, Education & Welfare
Washington, D. C.

Honorable J. Lee Rankin
The Solicitor General
Washington, D. C.

Honorable Malcolm Anderson
Assistant Attorney General
Washington, D. C.

Honorable Beatrice Rosenberg, Attorney
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OF COUNSEL FOR RESPONDENT
FRANK R. SCHELL